United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

Corrected copy

NO. 75-4155

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

COLUMBIA UNIVERSITY,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

ROBERT G. SEWELL,
MARJORIE S. GOFREED,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging employee Drucilla Cornell because of her protected concerted activities.

STATEMENT OF THE CASE

This case is before the Court upon the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order (A. 5, 47-49).[1] issued against Columbia University (hereinafter "the University"), on May 22, 1975 and reported at 217 NLRB No. 174. This Court has jurisdiction over the proceedings, the unfair labor practice having occurred in New York City, New York, where the University maintains its principal office and facilities.

I. THE BOARD'S FINDINGS OF FACT

A. Background

Drucilla Cornell, the sole discriminatee herein, commenced work as a telephone operator at the University's central switchboard on November 13 or 19, 1973 (A. 11; 78, 106). Another employee, Muriel Hirschfeld, was hired for a similar position on December 13 (A. 11; 78, 106, 212). Both employees worked a swing shift, from 12 noon to 8 p.m., under the direction of Onnie Lawton, who had been appointed day shift supervisor on October 26 (A. 10-11; 78-79, 150, 161, 212). When hired, the employees were given a list of operating procedures, prepared by Lawton, which included the following rules (A. 11; 68, 113, 213, 226-227):

> 1. Answering phrase: "This is Columbia." Do not give direct dial number to customer unless the number is asked for. "Please" and "Thank you" are to be used on all calls.

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[1] "A." references are to the printed appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

2. One minute and no longer on any call.

3. No listening in on calls, unless told.

4. Customer may hold on busy extension as long as he wishes.

5. The phrase for a busy signal is, "The extension is busy. Will you wait, please?"

6. Customer will not be abused by operators.

7. If there is a problem with a console, I want to know about it no matter what the trouble is.

8. If you do not have the name or extension listed in your directory, tell customer you will connect to information.

9. Whatever is discussed in this office, I would like to remain in here and not be carried outside.

The employees also received copies of a personnel policies handbook which outlined a grievance procedure established by the University to help non-union employees "solve any serious problem related to [their] work or relationship with the University" (A. 17, 44; 64). The procedure commenced at Step 1 with a meeting between the aggrieved employee and his immediate supervisor and proceeded at Steps 2 and 3 to meetings with his department head and with the Director of Personnel. At each step, the employee had the right to ask a fellow employee to accompany him to any conference at which his problem was discussed (A. 17, 44; 64).

B. Employee Cornell Proposes the Formation of a Grievance Committee

On January 11, 1974, Supervisor Lawton decided to discharge Muriel Hirschfeld at the end of the pay period, on January 23, because she did not "fit in" with the other employees (A. 1-5, 32; 154, 194-195, 200, 205, 213-214, 234). Under University policy, Lawton was not required

to give Hirschfeld notice of discharge and she did not do so (A. 2; 194-195, 211, 214). Instead, Lawton abruptly announced Hirschfeld's discharge on January 23 (A. 171, 234).

Meanwhile, on January 21, Lawton called Hirschfeld and Cornell into her office and informed them that they were not in trouble, but she wanted them to make certain changes in their telephone answering procedures (A. 15, 34; 79-80, 162). She then directed the employees not to ask callers to "hold or wait" when a line was busy, but to say nothing unless the customer asked a question (A. 15, 34; 79-80, 162). She also directed them not to ask callers who requested a telephone number whether they wanted to be put through to the number, but to simply give them the number and connect them (A. 15, 34; 79-80). Cornell and Hirschfeld were confused by the instructions and were upset by the interview (A. 15-16, 34; 80, 108-109, 162).

When Lawton left for lunch, Cornell and Hirschfeld discussed the new instructions with the day shift employees and complained that they did not understand them (A. 16; 80-81, 108, 110, 162, 242). Employee Gwen Giscombe told them not to be concerned because Lawton ran the office on the basis of her moods and not by any system (A. 16; 81, 108-109, 144, 146, 162). She added that she did not like Lawton's rule that employees had to raise their hands and ask "May I please go to the bathroom" when they wanted to leave their consoles (A. 16; 82, 115). Another employee, Barbara Joyce, remarked that she was a grown woman and did not need Lawton to tell her when to say "please" and "thank you" (A. 16; 81, 109, 111, 139, 143, 162). Cornell responded that those grievances should be brought to Lawton's attention and she intended to speak to Lawton about them (A. 16; 81, 140-141, 144, 148, 162-163, 237-238, 239). She explained that friends of hers had formed a grievance committee at a bank in California, that two of them had been

discharged and then reinstated and that the committee had been recognized by the bank (A. 16; 82). Hirschfeld said that she agreed with Cornell that something had to be done and would "back [Cornell] up" in anything she anything she said to Lawton (A. 1[illegible]81-82, 109). The other employees "pretty much agreed" to have Cornell speak for them (A. 16; 81-82, 116, 129, 148). Employee Marian Lloyd warned Cornell to be careful because she had been out sick and that could be used as an excuse for firing her (A. 16; 81, 106-108).

During their lunch break, at about 3 p.m., Cornell and Hirschfeld reviewed the situation and agreed that a grievance committee would be the best way to move ahead (A. 16-17; 82-83, 115, 162-163). They decided to give Lawton the benefit of the doubt and approach her separately with regard to the employees' grievances, with Cornell going in first and Hirschfeld following later to state that Cornell was speaking not only for herself but also for the other employees (A. 17; 83, 127, 163). They also decided that if either of them was presented with a "threatening situation," they would follow the University's grievance procedure which would permit the other to act as "witness" (A. 17; 83, 127, 192).

C. Cornell and Hirschfeld Present Their Demands to Supervisor Lawton

Later that day (January 21), Lawton instructed Hirschfeld to change consoles (A. 17; 83-84, 163, 233). Hirschfeld stopped to throw a piece of paper into the waste paper basket and to get an aspirin from her locker and Lawton told her, "We don't sashay around the office. Maybe that is what you do at night, we don't do that on my time" (A. 17; 84, 163, 233). When Lawton returned to her office, Hirschfeld told Cornell that she had to go in to talk to Lawton about the grievances and Cornell said that she would "back [Hirschfeld] up" (A. 17; 84, 163-164).

Hirschfeld proceeded to Lawton's office and asked to talk to her (A. 17; 84, 164, 186, 215). She then stated that Lawton's policies were inconsistent and unfair to the employees and they did not see why they had to use the specific phrase, "May we please be excused to go to the bathroom," which was petty because they were all adults (A. 17; 84, 123, 164, 215). Lawton responded, "That is your opinion if you don't like it, you can quit and I am the boss in [Room] 114" (A. 17; 85, 164, 215). She said that she was on her way out and that they could continue the discussion the next day (A. 17; 85, 164).

That evening, Cornell and Hirschfeld told the night shift employees about their meetings with Lawton and their decision to form a grievance committee (A. 17-18; 85-87, 116, 129-130, 164-165). The night shift employees were sympathetic to the idea but warned them to be careful (A. 18; 86-87). Cornell responded that the employees had a right to organize under the National Labor Relations Act and that she and Hirschfeld would take the initiative and hold themselves responsible to Lawton (A. 18; 87). With continuous suggestions from the other employees, Cornell and Hirschfeld then drew up a notice which they posted on the bulletin board (A. 18; 63, 87, 145, 165). The notice read as follows (A. 61):

> Workers do have rights. We have the right to bring our grievances to the attention of our employer. We have the right to organize to change our working conditions. We do not have to sit back passively and accept rules and regulations we think are unfair. Any group of us, chosen by election or directly, can represent the rest of the employees in a designated bargaining unit, equally as much so as an established union. The NLRB will protect any group of us equally as much as it will a union. There have been several precedent-setting cases in the last two years.

The following morning, February 22, Cornell and Hirschfeld met at nearby restaurant to review the events of the previous day and discuss how best

to proceed (A. 19; 89, 166). They decided that Cornell would speak to Lawton as soon as they arrived at work to tell her that they were bringing grievances not only for themselves but also for the other employees and to ask her to hold a meeting with the other employees or, at the very least, to speak to them individually about forming a grievance committee (A. 19; 89, 166). They also decided that if there was any trouble as a result of posting the notice, i.e., if one of them was called into the office and confronted with a threatening situation, the other would go in to act as her witness (A. 19; 89, 166).

When Cornell and Hirschfeld reported for work shortly before noon, they learned that Lawton had removed the notice from the bulletin board (A. 19, 25; 91, 119, 166, 217, 239, 240-241). Cornell went into the office and told Lawton that she and Hirschfeld had posted the notice and that it was unlawful to take it down because there were no prior restrictions on the use of the bulletin board (A. 19; 91-92, 119-120, 218, 234). Lawton responded that as far as she knew, Cornell had been wrong in posting the notice and should have spoken to her individually if she had any complaints (A. 19; 92, 128). Cornell explained that the employees had tried that route the night before, when Hirschfeld had tried unsuccessfully to present their grievances for them, and now wanted a grievance committee (A. 19; 92, 128, 218). She asked Lawton to hold a meeting with all the operators to discuss the matter (A. 19; 92). Lawton said that she would speak to the employees individually and Cornell said that that would be an acceptable compromise (A. 19; 92). Lawton then stated that she was aware of a "plot" against her and did not trust anybody who was working for her (A. 19-20; 92, 121-122). Cornell said that this was not so, that she and Hirschfeld had been open and honest with Lawton and were merely acting as workers, for the benefit of the entire office (A. 20; 92). She added that the National Labor Relations

Act guaranteed them the right to do so (A. 20; 92). Lawton said that if there was such a law, Cornell should have a "written document" with her and Cornell said that she would go to the library and try to find a summary of the Act (A. 20; 92).

Sometime that day, January 22, Lawton told Betsy Reed, a clerk-typist, that Hirschfeld was definitely going to be terminated and that Cornell would be next, if she did not watch her step (A. 27; 151-152).

In the evening, Cornell and Hirschfeld brought the night shift employees up to date on their dealings with Lawton, noting specifically that Cornell had informed Lawton that she and Hirschfeld were responsible for posting the notice and said that they would bring in some materials relating to the National Labor Relations Act (A. 20; 94, 172). The other employees again warned that they were taking the risk of being discharged (A. 20; 94, 171, 254). Before she left work, Hirschfeld posted another notice on the bulletin board which stated "Cows may come and cows may go, but the bull around this place goes on forever!!" (A. 20-21, 26; 94, 147, 155-156, 173).

D. Lawton Discharges Both Employees

The next morning, January 23, Cornell and Hirschfeld met at a restaurant and again agreed that if either of them got into trouble as a result of their activities, the other would act as witness pursuant to University policy (A. 21; 95, 168). They then went to the library, checked out a book on the National Labor Relations Act, for presentation to Lawton, and reported for work at about 10 minutes before noon (A. 21; 89, 96-97, 130, 168). As soon as they entered the locker room, Lawton told Hirschfeld that she wanted to speak to her (A. 21; 97, 130, 168, 219-220, 243). Hirschfeld walked into the office and placed the book on

Lawton's desk (A. 21; 192). Before Hirschfeld had a chance to say anything, Lawton handed her a paycheck and stated that she was fired for "incompatibility of views" (A. 21; 169, 193, 219-220). Hirschfeld said that she would not accept the firing, that she thought it was unfair and that she wanted to speak to somebody with more authority (A. 21; 97, 1969, 188, 220, 243). Lawton shouted, "[Y]ou're getting out of my office, or else I'll have to lay my hands on you" (A. 21; 97, 169, 188, 220, 243).

Cornell, who had just left the locker room and not yet commenced work, heard the shouting and decided that it was time to go into Lawton's office to act as Hirschfeld's witness (A. 22, 30; 97, 220, 244). She walked into the office and started to say, "Under University policy . . .," when Lawton interrupted, asking, "Is your name Muriel?" (A. 22; 97, 131, 244-245). Cornell said no, but added, "Under University policy, I have a right to be here as a witness, to act as Muriel's witness" (A. 22; 97, 169, 244). Lawton told Cornell to leave but Cornell refused to do so and Lawton threatened, "Get out or I'll knock your teeth down your throat" (A. 22; 97, 132, 169). Cornell sat down on a chair, repeating that she was there to act as Hirschfeld's witness. With that, Lawton handed Cornell her paycheck and said, "You're fired. You were next anyway" (A. 22; 97, 132, 169, 189-190). Then, Lawton called the security guards to remove the employees from the premises (A. 22; 98, 170, 189, 221).

Two guards arrived shortly thereafter and Cornell informed them that she and Hirschfeld had been discharged because of "a labor management dispute," that the discharges were unlawful and that they wanted to speak to Lawton's superior, James McGrady (A. 22, 28-29; 99-100). The guards called in Mr. Sidlowski, head of security, and after some discussion, Sidlowski told Lawton to summon McGrady (A. 22, 28-29; 100).

When McGrady arrived, he asked Cornell what she was doing in Lawton's office (A. 22; 100, 202). Cornell replied that she had been fired for acting as Hirschfeld's witness and wanted to tell him "what was going on here" (A. 100). McGrady said that he would prefer to speak to the employees individually, but Cornell said that they wanted to serve as each other's witnesses, and he permitted her to say (A. 100). Cornell then asked, "If you're letting me stay now as Muriel's witness, why on earth have I been fired?" (A. 100). McGrady responded, "You're not fired. You're indefinitely suspended" (A. 22; 100-101, 204). Hirschfeld then told McGrady that she thought she had been discharged for organizing the employees and that the University was discriminating against her because she was black (A. 101, 190, 193, 202). McGrady said that the University did not engage in racial discrimination and that there was nothing that he could do for her because she was a probationary employee (A. 22; 101, 204). He then suggested that both employees discuss their discharges with the personnel director (A. 101, 191, 204).

E. Cornell Insists Upon an Unconditional Reinstatement and Is Discharged for a Second Time

Later that day, January 23, Cornell and Hirschfeld filed formal grievances with the personnel department, alleging that they had been unlawfully discharged because of their organizational activities (A. 22; 101-102, 170-171, 191). They met with the personnel director the following day, accompanied by outside witnesses (A. 22; 102, 171). On January 25, McGrady advised Cornell by telephone that Hirschfeld's discharge had been upheld but that her own suspension was limited to three days (A. 22; 103-104). He also read Cornell a letter, which she received in due course of mail the following week (A. 22-23; 103-104). The letter stated as follows (A. 23; 66):

> This letter will confirm the verbal suspension given to you on January 23, 1974. This suspension was necessitated because of your uncalled for interference with the normal conduct of business by the chief operator and your refusal to desist with this interference when ordered to do so by the chief operator, your supervisor.
>
> You are suspended from your position as telephone operator at Columbia University as of January 23, 1974. This suspension is for a period of 3 working days. You will be expected back at your work January 28, 1974.
>
> You are, furthermore, warned that any repetition of the aforementioned conduct will result in the termination of your employment at Columbia University.

When Cornell received the letter, she telephoned McGrady and told him that she would not accept the conditions attached to her reinstatement (A. 23; 104-105). She noted that it was inconsistent for the University to permit her to act as a witness, and to be accompanied by a witness, in the later stages of the grievance procedure but not in the first step (A. 105, 134). McGrady responded that he could not do anything about the letter, that the matter was out of his hands and that he was sorry things worked out the way they did (A. 23; 105). Cornell told him that she would file a charge with the Board on behalf of Hirschfeld and herself (A. 23; 105).

Some time later, McGrady telephone Cornell and read her a second letter, which stated that in view of her failure to return to work, the University concluded that she had resigned (A. 23; 47; 105).

II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found, in agreement with the Administrative Law Judge that the University violated Section 8

(a)(1) of the Act by discharging Drucilla Cornell for engaging in protected concerted activities (A. 1, 46).[2] The Board's order requires the Company to cease and desist from the unfair labor practice shown and from, in any other manner, interfering with, restraining or coercing its employees in the exercise of their Section 7 rights (A. 5, 47-48). Affirmatively, the Board's order requires the University to offer Drucilla Cornell immediate and full reinstatement to her former or substantially equivalent position, without prejudice to her seniority or other rights and privileges, to make her whole for any loss of earnings suffered by reason of the discrimination against her and to post the appropriate notices (A. 5; 48-49).

ARGUMENT

SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE UNIVERSITY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING DRUCILLA CORNELL BECAUSE OF HER PROTECTED CONCERTED ACTIVITIES

A. The Board reasonably concluded that Cornell was discharged because she exercised her Section 7 right to join with other employees in attempting to form a grievance committee and present demands to management

Section 7 of the Act provides that employees "shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage

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[2] Reversing the Administrative Law Judge, the Board found that Muriel Hirschfeld's concerted activity was not a causative factor in her discharge and therefore dismissed the 8(a)(1) allegation insofar as it related to her (A. 1-4).

in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." That section insures not only the right to engage in union-connected activities, but also the fundamental right to join together to seek better terms or conditions of employment, to present grievances and to come to the aid of other employees whose job interests are threatened. See generally, *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, 14-17 (1962); *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505-506 (C.A. 2, 1942), cited approvingly in *N.L.R.B. v. v. J. Weingarten, Inc.*, 420 U.S. 251, 260-261 (1974); *Trico Corporation v. N.L.R.B.*, 489 F.2d 347, 352, (C.A. 2, 1973); *Hugh H. Wilson Corp. v. N.L.R.B.*, 414 F.2d 1345-1347 (C.A. 3, 1969), cert. denied, 397 U.S. 935. Section 8(a)(1) implements that guarantee by making it an unfair labor practice for an employee to interfere with, restrain or coerce employees in the exercise of rights guaranteed by Section 7. Thus, as the Supreme Court has emphasized, the Act affords a broad protection to unorganized employees who have "to speak for themselves as best they [can]." *N.L.R.B. v. Washington Aluminum Co., supra,* 370 U.S. at 14. Accordingly, it has long been recognized that Section 7 protects concerted activities "whether they take place before, after or at the same time [a specific] demand is made" (*N.L.R.B. v. Washington Aluminum Company, supra,* 370 U.S. at 14), that protection must necessarily be extended to " 'intended, contemplated or even referred to' group action, lest employer retaliation destroy the bud of employee initiative" (*Hugh H. Wilson Corp. v. N.L.R.B., supra,* 414 F.2d at 1347), and that "[t]he activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much a 'concerted activity' as is ordinary group action. The one seldom exists without the other" (*Owens-Corning Fiberglas Corp. v. N.L.R.B.*, 407 F.2d 1357, 1365 (C.A. 4, 1969)).

In the instant case, the Board found that the Company discharged Drucilla Cornell because she openly proclaimed and, in fact, exercised her right to join with other employees in attempting to form a grievance committee and present their demands to management. That finding is amply supported by the record. As shown in the Statement, Cornell commenced her concerted activities on January 21, 1974, when she and her co-worker, Muriel Hirschfeld, were called into Supervisor Lawton's office and instructed to revise their procedures for answering incoming telephone calls. Confused by the instructions and believing them to be inconsistent with written rules previously promulgated by Lawton, Cornell voiced her complaints about this "new change in policy" to the day shift employees and they, in turn, complained about other work rules imposed by Lawton (A. 110). Cornell then discussed a grievance committee that some friends had established at a bank in California and volunteered to speak to Lawton about the employees' grievances. Hirschfeld said that she would back Cornell up in anything that she had to say and the other employees tacitly agreed that something should be done. During their lunch break, Cornell and Hirschfeld agreed that a grievance committee would be the best way to proceed, but decided to give Lawton the benefit of the doubt and approach her individually about the grievances. They planned to have Cornell speak to Lawton first, with Hirschfeld coming in later to emphasize that Cornell was not merely speaking for herself, but on behalf of all the employees. They also contemplated that if one of them was presented with a "threatening situation" (A. 83), the other would go in to act as her witness under the University's grievance procedure. Thereafter, they took steps to implement their agreements.

That afternoon, Lawton rebuked Hirschfeld for taking the time to throw a piece of paper into the waste paper basket and get an aspirin from her locker, and Hirschfeld told Cornell that she wanted to be the

first to speak to Lawton about the grievances. Hirschfeld then proceeded to the office and told Lawton that her policies were inconsistent and unfair to the employees, that they did not see why they had to use the specific phrase, "May we please please be excused to go to the bathroom" (A. 164), and that they thought it was petty because they were all adults. Lawton responded that she was "the boss in 114" (A. 164) and if Hirschfeld did not like the way she ran the department she could quit. With that Lawton left the office.

Later that day, Cornell and Hirschfeld told the night shift employees that Hirschfeld had tried to present grievances to Lawton, but had been rebuffed, and that they now wanted to form a grievance committee. The other employees were sympathetic but advised them to proceed with care because they might be fired. Cornell and Hirschfeld then drew up a notice, which they posted on the bulletin board, asserting that employees had the right to organize and that, under the National Labor Relations Act, "any group of them, chosen by election or directly, could represent the rest of the employees in a designated bargaining unit, equally as much so as it will a union" . . . . (A. 61) Cf. p. 6, *supra.* The next morning, Lawton removed the notice.

When Cornell arrived at work, about 12 noon, she told Lawton that Hirschfeld has spoken to her the previous day on behalf of all the employees, that both of them were responsible for posting the notice and that they now wanted a grievance committee. She asked Lawton to meet with all of the employees, or at least to speak to the employees individually, to discuss the question. Lawton responded that as far as she knew they were wrong in posting the notice and that they should have come to her individually about their grievances. She also said that she was aware of a "plot" against her and did not trust any of the employees (A. 92). And when Cornell protested that the employees had a right to

join together to present grievances, she told Cornell that she should have brought in a document to prove it. That same day, Lawton told clerk-typist Betsy Reed that Hirschfeld was definitely going to be discharged and that Cornell would be next, if she did not watch her step.

The next morning, Cornell and Hirschfeld went to the library and checked out a book on the National Labor Relations Act to show to Lawton. However, when they arrived at work, Lawton called Hirschfeld into her office and summarily discharged her. Hirschfeld refused to accept the discharge, stating that she wanted to talk to somebody with more authority and Lawton shouted, "You're getting out of my office or else I'll have to lay my hands on you" (A. 97). Hearing that, Cornell entered the office and told Lawton that she was there to serve as Hirschfeld's witness. Lawton ordered her to leave, Cornell refused to do so and Lawton threatened, "Get out or I'll knock your teeth down your throat" (A. 97). Cornell insisted that, under University policy, she had a right to remain and Lawton responded, "You're fired. You were next anyway" (A. 97). Clearly, the Board could infer discriminatory motivation from this entire sequence of events. As the Board found, Lawton obviously regarded Cornell's insistence on appearing as Hirschfeld's witness as a continuing threat to her authority and, having in mind her concerted activities in the preceding 48-hour period, discharged her because of them.

Moreover, as the Board further found (A. 1, 43-44), Cornell's action in coming to Hirschfeld's aid on January 23 was itself entitled the protection of the Act. As noted above, Cornell and Hirschfeld had previously agreed to assist each other by acting as witness, under the University's procedures, in the event a "threatening" situation developed. Cornell's efforts on January 23 thus implemented the two employees' prior commitment to aid each other in any disciplinary confrontation with management. By exercising vigilance to make certain that Lawton did not impose discipline

unfairly, Cornell was attempting not only to safeguard Hirschfeld's job interests and her own, but also to effectuate their right and the right of all employees to present grievances and have the aid of a representative. Indeed, Cornell's presence in Lawton's office was an assurance to the other employees that they too could obtain aid and protection by acting together in any similar situation. Thus, concerted activity was no less present here than it was held to be in *N.L.R.B. v. J. Weingarten, Inc., supra,* 420 U.S. at 260-261, wherein the Supreme Court upheld an employee's right to be assisted by his union representative at any interview with management which might reasonably be expected to result in disciplinary action.[3] See also, *International Ladies' Garment Workers Union, Upper South Department, AFL-CIO v. Quality Manufacturing Co.,* 420 U.S. 276, 280 (1974).

The Board also reasonably found that the University's subsequent actions in changing Cornell's discharge to a three day suspension on the condition that she refrain from "uncalled for interference with the normal conduct of business by the chief operator" (A. 66) did not dissipate the coercive effect of her original discharge. For, as Cornell later claimed in filing her formal grievance, there was no uncalled for interference with the chief operator and Cornell had, in fact, been discharged for exercising her Section 7 rights. Accordingly, the Board concluded that the University further violated Section 8(a)(1) by suspending Cornell on January 25 and by discharging her for a second time when she demanded reinstatement without improper conditions (A. 1, 44-45). *N.L.R.B. v. Goya*

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[3] The right recognized in *Weingarten* was founded on the employees' Section 7 right to act concertedly for their mutual aid or protection and thus necessarily encompasses assistance from another employee as well as from a union official. 420 U.S. at 260-263; and see Justice Powell's dissenting opinion, at p. 270.

Foods, Inc., 303 F.2d 442, 443 (C.A. 2, 1962), cert. denied, 371 U.S. 911; *Ridgely Manufacturing Company v. N.L.R.B.*, 510 F.2d 185, 188 (C.A.D.C., 1975); *N.L.R.B. v. Garland Knitting Mills of Georgia*, 408 F. 2d 672, 673 (C.A. 5, 1969); *N.L.R.B. v. Lone Star Textiles, Inc.*, 386 F.2d 535, 537 (C.A. 5, 1967).

B. The Board properly credited Cornell's testimony in finding that the University had knowledge of Cornell's concerted activities and discharged her because of those activities.

Before the Board, the University initially contended that no violation could be found because the Administrative Law Judge erred in crediting Cornell's testimony with respect to her concerted activities and meetings with Lawton and in rejecting Lawton's testimony that she had no knowledge, as a result of those meetings or otherwise, that Cornell was acting concertedly with Hirschfeld and other employees in attempting to form a greivance committee and in presenting grievances. The Board properly rejected this contention. As the Judge found, Cornell appeared to be a generally reliable witness who "recited facts clearly, emphatically and in great detail" (A. 34). Moreover, while she did have some tendency to exaggerate (A. 34), her testimony was corroborated in every significant respect by Hirschfeld and other employees, by objective evidence and by Lawton's own admissions, as we have carefully documented above. Thus, it could not be said that the Judge's evaluation of Cornell's testimony was "hopelessly incredible." *N.L.R.B. v. Langenbacher Co.*, 398 F.2d 459, 462 (C.A. 2, 1968), cert. denied, 393 U.S. 1049.

Furthermore, the Judge was not compelled to accept Lawton's denial of knowledge at face value. Lawton admitted that Cornell and Hirschfeld had approached her separately on January 21 and 22 with respect to employee grievances (A. 24, 26; 215, 218, 234). She also admitted

to having read the workers' rights notice which set forth, in essence, that "we", the employees have the right to present grievances to our employer, to organize to change our working conditions and to be protected by the Board as if "we" are a union (A. 18-19, 25; 61, 217). Additionally Lawton admitted that Cornell told her that it was she who had posted the notice (A. 26; 218, 234). It therefore strains credulity to believe that Lawton thought it was merely a coincidence that two employees were bringing grievances almost simultaneously and that the grievances were substantially the same (A. 215, 218). Indeed, her statement to Betsy Reed – that she had definitely decided to discharge Hirschfeld and that Cornell would be next, if she did not watch her step – proves that she had linked the employees' activities together in her mind. In these circumstances, the Administrative Law Judge – relying in part upon circumstantial evidence and in part upon Cornell's credited testimony that she specifically told Lawton that she and Hirschfeld had acted together in presenting grievances and in posting the workers' rights notice – was amply justified in concluding that the University had direct knowledge of Cornell's protected concerted activities prior to her discharge (A. 37-38). Since findings of fact and "questions of credibility are for the [Administrative Law Judge] and the Board", this determination should not be disturbed. *N.L.R.B. v. L.E. Farrell Co.*, 360 F.2d 205, 206 (C.A. 2, 1966).

The University's stated reasons for the discharge were equally untenable. Thus, McGrady, in denying that any unlawful motivation was involved, testified that the only reason Cornell was discharged and later suspended was that she left her console unattended and refused to obey Lawton's repeated instructions to return to work (A. 204(a)). However, none of this was mentioned in the letter sent to Cornell in which her disciplinary action was sustained. As shown, that letter merely noted

that disciplinary action had been taken because of Cornell's "uncalled for interference" with Lawton and her refusal to desist from interfering when Lawton ordered her to leave (A. 66). Moreover, Lawton, herself, testified that when Cornell came into her office asserting that Hirschfeld "was due a witness", Cornell had not yet plugged in her console and reported for work (A. 45; 220). Lawton further testified that events preceding Hirschfeld and Cornell's discharges lasted only about five minutes (A. 225) and the two employees both stated that they came to the office ten minutes early, intending to resume their earlier discussions with Lawton about the National Labor Relations Act. Thus, as the Judge found, Cornell was attempting to act as Hirschfeld's witness on her own non-working time. It followed, as the Judge also concluded, that Cornell was discharged, not for any valid economic reason, but wholly on discriminatory grounds (A. 44-45).

C. The Board properly rejected the University's contention that Cornell was a "self-proclaimed" witness outside the Act's protection.

Necessarily, the University was forced to fall back on the contention that Cornell's discharge was justified because she injected herself into Hirschfeld's discharge without being requested to act as witness (A. 43). The short answer to this contention is that there was no indication, when Hirschfeld was called in Lawton's office, that there would be a disciplinary proceeding, and Hirschfeld was under the impression that Lawton merely wanted to continue their previous discussion concerning employee grievances. Indeed, Hirschfeld carried with her a book on the National Labor Relations Act to show to Lawton. Thereafter, Hirschfeld had no opportunity to ask for a witness, for she was handed her paycheck and discharged immediately upon entering the office. Then, when Cornell

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appeared, Hirschfeld was again deprived of a chance to state her position, for Lawton said that she had no need of a witness and ordered Cornell out of the office. In these circumstances, it was sufficient to constitute protected concerted activity that Cornell and Hirschfeld had previously agreed to act as each other's witness and that Cornell told Lawton that this was her purpose in coming to Hirschfeld's aid.

Nor is it a defense that Hirschfeld had already been discharged when Cornell arrived. "[T]he matters occurred within such a brief time and so quickly that Cornell's intervention came at the first warning and at the first opportunity that Cornell had to learn that her co-activist was in trouble" (A. 45). Furthermore, at that time, it was by no means clear that the interview was over, for Hirschfeld had refused to leave the office. Indeed, she had already told Lawton that she would not accept the discharge and wanted to speak to somebody with more authority, preferably McGrady. This being the case, she was entitled to a witness under the University's own policy, as long as she remained in Lawton's office waiting for McGrady to arrive. Accordingly, as Cornell later explained to McGrady, it would have been inconsistent for the University to discharge her for insisting on remaining with Hirschfeld during the first step of the University's grievance procedure, when she was most needed, while permitting her to act as witness, and to be accompanied by witnesses, at every succeeding stage. For all these reasons the Board properly found that even if the University had discharged Cornell solely because she had insisted on acting as Cornell's witness, such action would also have been violative of the Act.

CONCLUSION

For the reasons stated above, it is respectfully submitted that a judgment should issue enforcing the Board's order in full.

ROBERT G. SEWELL,
MARJORIE S. GOFREED,
Attorneys,
National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,
National Labor Relations Board.

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